ADJUDICATORY ISSUE

(Affirmation)

August 22, 1983 SECY-83-347

For: The Commissioners

From: Martin G. Malsch
Deputy General Counsel

Subject: REVIEW OF ALAB-734 (IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.)

Facility: Seabrook Station, Units 1 and 2

Purpose: To advise the Commission of an Appeal Board decision which, in our opinion, EX.5

Review Time Expires: August 29, 1983

Petition for Review: None filed

Discussion: In ALAB-734, the Appeal Board denied a petition by the New England Coalition on Nuclear Pollution (NECNP) for directed certification of the Licensing Board's summary dismissal of NECNP's contention on the adequacy of the section of Applicants' Final Safety Evaluation Report (FSAR) relating to the quality assurance program for Seabrook. The Appeal Board further held that once the FSAR is supplemented, NECNP need only

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show good cause for filing a contention late to satisfy the late-filing criteria in 10 CFR 2.714(a). We believe that

EX.5

NECNP contended that the Applicants had failed to satisfy 10 CFR 50.34(b)(6)(ii) which they believed required the FSAR to demonstrate how the quality assurance requirements of Part 50, Appendix B would be satisfied.[1] The Licensing Board dismissed the contention, holding as a matter of law that the Applicants had complied with 10 CFR 50.34(b)(6)(ii) by making commitments to conform to the Regulatory Guides and American National Standards Institute (ANSI) standards on quality assurance.

NECNP, arguing that commitments by the Applicants in the FSAR did not satisfy 10 CFR §50.34(b)(6)(ii), petitioned for directed certification. The Appeal Board denied NECNP's petition finding that NECNP had failed to show that the Licensing Board's ruling would "affect the basic structure of the proceeding in a pervasive or unusual manner," one of two alternative criteria which must be

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[1] 10 CFR §50.34(b)(6)(ii) requires that the FSAR include "a discussion of how the applicable requirements of Appendix B will be satisfied."

satisfied for the grant of directed certification.[2]

The Appeal Board, however, was concerned over the Licensing Board's failure to address whether NECNP would be permitted to file a late contention once the Applicant supplemented the FSAR. Specifically, the Appeal Board wanted the parties' views on whether a showing of good cause by NECNP for filing a contention late could be outweighed by the other late-filing criteria in 10 CFR 2.714(a) so as to warrant the Licensing Board's rejection of that late-filed contention.[3] In the oral argument held to consider on this issue, counsel for

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[2] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977), established the two alternative criteria for the grant of directed certification. The other criterion, which states that the petitioner must be threatened with "immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal," was not maintained by NECNP.

[3] The Appeal Board was particularly concerned about the fifth factor (§2.714(a)(1)(v)), which states:

> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Board assumed that Staff and Applicant would challenge admission on the first "good cause" factor (§2.714(a)(1)(i)).

The Appeal Board's concern seems to be a result of the Commission's recent partial reversal of Duke Power Co.

(Footnote Continued)

Staff and Applicants stated that they could not find any room for a Licensing Board to reject a late-filed contention that satisfied the good cause factor. The Appeal Board agreed. In light of that, the Appeal Board reasoned that the Licensing Board's dismissal of NECNP's contention would not "affect the basic structure of the proceeding," because the Licensing Board's interpretation of Section 50.34(b)(6)(ii) was of "relatively little true significance." ALAB-734, p.11. EX. 5

However, we believe

(Footnote Continued)

(Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982), in CLI-83-19, 17 NRC ____ (June 30, 1983). The Commission in that decision required a balancing of all five of the late intervention factors in §2.714(a)(1) for admission of late-filed contentions.

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EX 5

Martin G. Malsch
Deputy General Counsel

Attachment:
ALAB-734
Draft Order

x 5

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, September 2, 1983.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, August 26, 1983, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of September 5, 1983. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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ENCLOSURE 1

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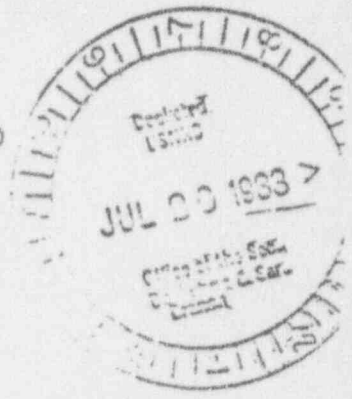
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD



Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

SERVED JUL 20 1983

In the Matter of	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	)	Docket Nos. 50-443 OL 50-444 OL
(Seabrook Station, Units 1 and 2)	)	

Diane Curran, Washington, D.C. (with whom William S. Jordan, III, Washington, D.C., was on the brief), for the intervenor, New England Coalition on Nuclear Pollution.

R. K. Gad, III, Boston, Massachusetts (with whom Thomas G. Dignan, Jr., Boston, Massachusetts, was on the brief), for the applicants, Public Service Company of New Hampshire, et al.

Roy P. Lessy (with whom William F. Patterson, Jr., and Robert G. Perlis were on the brief) for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

July 19, 1983

(ALAB-734)

The New England Coalition on Nuclear Pollution (Coalition), an intervenor in this operating license proceeding, has petitioned for directed certification of so much of the Licensing Board's May 11, 1983 memorandum and order as granted summary disposition against it on Coalition Con-

tention II.B.4. For the following reasons, the petition is denied.[1]

1. The quality assurance criteria for nuclear power plants are set forth in Appendix B to 10 CFR Part 50. Pursuant to 10 CFR 50.34(b)(6)(ii), the Final Safety Analysis Report (FSAR) accompanying an application for an operating license must include "a discussion of how the applicable requirements of Appendix B will be satisfied." In Contention II.B.4, the Coalition asserted that the Seabrook FSAR failed to fulfill this mandate insofar as the applicants' operational quality assurance program for replacement parts and repair work is concerned.[2]

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[1]Another intervenor in the proceeding filed an appeal from, and in the alternative sought directed certification of, a discrete ruling contained in the same Licensing Board order. We dismissed the appeal and denied directed certification in ALAB-731, 17 NRC ___ (June 20, 1983).

[2]The full text of the contention is as follows:

> The Quality Assurance Program for operations as described in the FSAR does not demonstrate how the Applicant will assure that replacement materials and replacement parts incorporated into structures, systems, or components important to safety will be equivalent to the original equipment installed in accordance with proper procedures and requirements, and otherwise adequate to protect the public health and safety. Similarly, the Quality Assurance Program does not assure or demonstrate how repaired or reworked structures, systems, or components will be adequately inspected and tested during and after the repair or rework and documented in "as built" drawings.

In granting the motions of the applicants and the NRC staff for summary disposition of the contention, the Board took note of the acknowledged absence of any genuine issue of material fact and concluded that, as a matter of law, the FSAR complied with the dictates of 10 CFR 50.34(b)(6)(ii). The conclusion rested on the following considerations:

> In [FSAR] § 17.2.2.4 Applicants have committed to conform to the recommendations of Regulatory Guide 1.33, February 1978, "Quality Assurance Program Requirement[s] (Operation)". . . .
>
> Applicants have committed to satisfy § 5.2.13 [of a standard of the American National Standards Institute], "Procurement Materials Control," which requires that purchased materials and components associated with safety-related structures or systems be purchased to specifications equivalent to those specified for the original equipment. . . .
>
> Applicants have committed to a program that requires that spare and replacement parts must be purchased to meet the technical and quality level equal to that of equipment originally purchased, that inspection be made to assure proper installation of replacement parts and materials, that repaired or reworked items must be inspected or tested to assure their acceptability, and that documentation of design changes will be acceptable to personnel. . . .
>
> The NRC Staff indicated that at a later date the Applicants must submit a QA manual which will set forth the actual procedures that are being developed. That manual will be inspected by Region I personnel prior to the Applicants' receipt of an operating license. . . .
>
> At this point in time. . .Applicants have sufficiently outlined in the FSAR how they will meet the quality assurance requirements.

May ., 1983 memorandum and order (unpublished) at 28-30.

2. Before us, the Coalition argues that interlocutory appellate review is warranted because the ruling below on

Contention II.B.4 is not only legally erroneous but, additionally, "affect[s] the basic structure of the proceeding in a pervasive or unusual manner" within the meaning of Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).[3] In essence, the Coalition's position is that the acceptance by the Licensing Board of applicants' "commitments" to meet the Appendix B quality assurance criteria cannot be squared with the Section 50.34(b)(6)(ii) directive that the FSAR describe how those criteria will be satisfied. We are further told by the Coalition that the Board's ruling has "critical implications. . .for the validity of the overall licensing decision." Petition at 9.

For their part, both the applicants and the staff maintain that, whether correct or erroneous, the Licensing Board's ruling does not warrant our interlocutory review. In its written response to the petition, the staff went on to defend the ruling on the merits.[4] According to the

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[3] Marble Hill established two alternative criteria for the grant of directed certification. There is no claim here that the other test is also satisfied; i.e., the Coalition does not maintain that the challenged ruling threatens it with "immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal." 5 NRC at 1192.

[4] In an unpublished June 20, 1983 memorandum and order scheduling the Coalition's petition for oral argument, we

(Footnote Continued)

staff, the "commitment" to which the Licensing Board attached the greatest significance was the applicants' adoption in their FSAR of the detailed guidelines established in Regulatory Guide 1.33 (February 1978), which in turn incorporates standards promulgated by the American National Standards Institute (ANSI). As the staff sees it, that adoption -- coupled with the FSAR description of the overall quality assurance program -- sufficed to meet the applicants' Section 50.34(b)(6)(ii) obligation. Any further detail, so the argument proceeds, can await the issuance of the applicants' quality assurance manual in implementation

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(Footnote Continued)
noted our disapproval of the applicants' failure to have treated the merits of the controversy in their written response. For the guidance of our Bar as a whole, we reiterate the concluding paragraph of our discussion on the point:

> [O]ur general expectation is that an opposition to a directed certification petition will include at least some discussion of the petitioner's claim of Licensing Board error. (Indeed, more broadly, the response to any motion (and a petition for directed certification falls in that category) is incomplete if it totally ignores assertions advanced in support of the relief sought by the movant.) How comprehensive the discussion of the merits need be will depend, of course, upon the totality of the circumstances of the particular case. Where, as here, the Board below has summarily disposed of a principal contention of a party on a subject having as much potential safety significance as does quality assurance, the respondents to the petition should treat the merits in reasonable detail.

June 20, 1983 memorandum and order at 4-5.

of the program outlined in the FSAR. Once the manual becomes publicly available, the Coalition will be free to submit a new contention if it deems the procedures set forth therein to be inadequate to insure compliance with the Appendix B criteria. See pp. 7-8, infra.

3. As seen, the Coalition's petition would have us decide at this interlocutory stage whether the treatment in the FSAR of the applicants' quality assurance program for replacement parts and repair work -- which includes a commitment to comply with the relevant provisions of Regulatory Guide 1.33 and the ANSI standards incorporated therein -- is a sufficient "discussion of how the requirements of Appendix B will be satisfied" within the meaning of 10 CFR 50.34(b)(6)(ii). Insofar as we are aware, that portion of the regulation has not received prior adjudicatory scrutiny. And it may be that the Coalition is right that the phrase in question should be interpreted as calling for greater illumination of the details of the quality assurance program than has been supplied in this FSAR. But it scarcely follows that the directed certification standard has been met. Contrary to the Coalition's claim, it does not appear to us that the Licensing Board's interpretation and application of Section 50.34(b)(6)(ii) -- even if of doubtful validity -- perforce will have a pervasive or unusual effect upon the basic structure of this proceeding. And, as we stressed in

NECNP's view of the "how" may not be incorrect

WHY? NOT?

Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310-11 (1981), the fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the long-standing articulated Commission policy generally disfavoring such review. See 10 CFR 2.730(f).

4. Notwithstanding the foregoing considerations, there was one aspect of the Licensing Board's ruling that became of concern to us early in our appraisal of the Coalition's petition. Although deeming the description of the operational quality assurance program in the FSAR to be sufficient compliance with 10 CFR 50.34(b)(6)(ii), the Licensing Board took pains to point out that, prior to commencement of facility operation, the applicants must supplement that description with a quality assurance manual in which "the actual procedures that are being developed" are set forth. See p. 3, supra.[5] The Board did not go on to address explicitly the question whether, when the manual became publicly available, the Coalition might file a new contention directed to the adequacy of those procedures. But, as previously noted, the staff took a position on that question in its response to the Coalition's petition. In

[5]This obligation appears to have its roots in Section II of Appendix B to 10 CFR Part 50.

the staff's view, the grant of summary disposition on Contention II.B.4 was "without prejudice. . .to a later assertion by [the Coalition] in the form of a contention that the actual procedures, once they are submitted, are deficient." Response at 11. In this connection, the staff pointed to our decision in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982). We there held that "as a matter of law a contention cannot be rejected as untimely if it (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination."

In common with the staff, it seemed to us that the Coalition's opportunity to challenge the adequacy of the applicants' quality assurance procedures should not hinge upon whether the procedures were fully spelled out in the FSAR (as the Coalition has insisted they should have been) or, rather, were reserved for a later-issued manual (as the Licensing Board implicitly concluded is permissible). What the staff response left unclear, however, was whether, as a practical matter, the Coalition would be able to avail itself of our Catawba holding.

Although Appendix B requires the formulation of detailed quality assurance procedures (see fn. 5, supra), neither it nor any other Commission regulation of which we are aware specifies how far in advance of reactor operation the procedures are to be submitted. For present purposes, all that was before us on that score was the applicants' representation in Section 17.2.2.1 of the FSAR that their quality assurance program would be "implemented at least 90 days prior to fuel loading." By that time, of course, the evidentiary record in this proceeding well could be closed.

In the circumstances, we decided to hear oral argument on the petition and to direct the parties to discuss at argument, inter alia, the question of the remedy that would be open to the Coalition were the detailed quality assurance procedures not to become publicly available until after the evidentiary record had closed. June 20, 1983 memorandum and order at 5-6.

5. Between the issuance of our June 20 order and the date of argument (July 13), there were two developments having a bearing on our inquiry. First, on June 30, the Commission reversed in part our Catawba decision. CLI-83-19, 17 NRC ___. The Commission held that, even if it were to satisfy the three-part test we laid down in ALAB-687 (see p. 8, supra), a belated contention nonetheless is amenable to rejection on the strength of a balancing of all five of the late intervention factors set forth in 10 CFR

2.714(a).[6] Second, in a July 5 letter, applicants' counsel advised us that a number of the detailed quality assurance procedures within the scope of Contention II.B.4 are now both formulated and available for inspection and that the balance would be so available no later than October 1, 1983.[7] (Presumably, the totality of the procedures constitutes the manual to which the Licensing Board referred.)

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[6]Those five factors are:

(i) Good cause, if any, for failure to file on time.
(ii) The availability of other means whereby the petitioner's interest will be protected.
(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
(iv) The extent to which the petitioner's interest will be represented by existing parties.
(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Commission did agree that our "three-part test constitutes a reasonable and useful test of the good cause factor as applied to late-filed contentions based solely on information contained in institutionally unavailable licensing-related documents." CLI-83-19, 17 NRC at ___ (slip opinion at 9). It held in effect, however, that, in a particular case, a Board might conclude that, although there was good cause for the late submission of the contention, the other four factors operated to outweigh that consideration.

[7]As we understand it, in no event will the evidentiary record in this proceeding close prior to this December.

Given these developments, at oral argument we sought the views of counsel for the applicants and the staff respecting whether, in the event that the Coalition were to prevail on the good cause factor (i.e., to satisfy each element of the three-part Catawba test), there might nonetheless be room for the Licensing Board to reject a new quality assurance contention on the basis of the other Section 2.714(a) factors -- particularly, the fifth factor.[8] (As scarcely requires elaboration, the outcome of the balancing of the five factors in a specific case will turn upon the particular circumstances of that case.) Both counsel responded in the negative -- without, of course, conceding that, in fact, the Coalition will be able to make the requisite good cause showing. App. Tr. 41-42, 44, 52, 55. We agree with that assessment. This being so, we are now persuaded that, far from doing violence to the basic structure of the proceeding or to the Coalition's participational rights, the Licensing Board's interpretation of Section 50.34(b)(6)(ii) is of relatively little true significance.[9]

a ruling on factor five before the issue ever arises! OK??

i.e. → the "low" standard in regulation means nothing because the intervenors can file another contention when the QA manual comes out ???

[8] Patently, the acceptance of the contention would broaden the issues and might bring about some measure of delay in concluding the proceeding (the fifth factor).

[9] One of the prongs of the Catawba good cause test is that the contention be "tendered with the requisite degree

(Footnote Continued)

To be sure, the Coalition would have preferred the FSAR to contain greater detail regarding the implementation of the applicants' quality assurance program for replacement parts and repair work. And it is equally true that, had that detail been provided (as the Coalition maintains was mandated by the regulation), the Coalition might not be faced with the possible future burden of justifying the filing of a late contention from the standpoint of the good cause factor as delineated in Catawba. But that burden should not be a difficult one to fulfill if whatever contention the Coalition were to advance following receipt of the complete quality assurance manual rests upon the disclosures in that manual, rather than upon information that was available to it from other sources at the time Contention II.B.4 was filed.

(Footnote Continued)
of promptness once the document comes into existence and is accessible for public examination." See p. 8, supra. Although portions of the quality assurance procedures may have been available for some time, counsel for the applicants acknowledged that, "through no fault" of its own, the Coalition had not been previously aware of the piecemeal release and that, in any event, the procedures are intended to be made available for review and inspection as a single unit. App. Tr. 32-33. See also App. Tr. 70. In this case, therefore, the clock will start to run for the Coalition on the date that the last quality assurance procedure dealing with replacement parts and repair work becomes publicly available.

The Coalition's petition for directed certification is denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

ENCLOSURE 2